INDEX

CITATIONS

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1296

WILLIAM A. WAREHIME, D. B. A. NEZEN MILK FOOD COMPANY, ET AL., PETITIONERS

v.

H. H. VARNEY, MILK MARKET AGENT, WAR FOOD ADMINISTRATION, AND FRED W. ISSLER, MARKET AGENT, WAR FOOD ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 118–130) is reported at 147 F. 2d 238. The findings of fact and conclusions of law of the district court appear at pages 105–111 of the record. The opinion of the district court on respondents' motion to quash service (R. 14–15) and the court's supplemental opinion on the motion for injunction, which is not included in the record, are reported at 54 F. Supp. 907.

JURISDICTION

The judgment of the circuit court of appeals was entered February 8, 1945 (R. 117). A petition for rehearing was denied March 19, 1945 (R. 130). The

petition for a writ of certiorari was filed May 21, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1945.

QUESTIONS PRESENTED

1. Whether a public announcement of sanctions applicable to violators of a food distribution order promulgated by the War Food Administrator constituted a sufficient threat of irreparable damage to justify the issuance of an injunction against local administrators, who had no power to enforce such sanctions, restraining them from collecting assessments due under the order.

2. Whether an assessment against handlers of milk to pay the costs of local administration of a milk allocation order, in accordance with customary practice in the regulation of the milk industry, constitutes an appropriate exercise of the power delegated by the Second War Powers Act to make rules and regulations for the allocation of scarce materials under such conditions as may be deemed necessary and appropriate.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Second War Powers Act and of the food distribution orders promulgated thereunder appear in the Appendix, *infra*, pp. 13–16.

STATEMENT

Proceeding under the authority vested in him by the President pursuant to the Second War Powers Act, *infra*, p. 13, the War Food Administrator, on September 7, 1943, issued Food Distribution Order

No. 79 (8 F. R. 12426) establishing a system for allocating milk among handlers of that product. The order authorized the Director of Food Distribution of the War Food Administration to designate milk sales areas, and within such areas to establish quotas among handlers for the sale of milk and milk by-products; to appoint in each area or combination of areas a market agent who would obtain and assemble reports from handlers of milk, receive petitions for relief from hardship and transmit such petitions to the Director with his recommendation, keep books and records, audit and inspect books and inventories of handlers of milk, and investigate and report violations to the Director. The order further provided that the handlers should pay to the market agent an assessment to be fixed by the Director of Food Distribution at a rate not to exceed three cents per hundredweight of milk, such funds to be used to meet expenses incurred in the administration of the sales-area order. The market agent was authorized to collect the assessment and to use the funds thus received for his necessary expenses. The order contained a provision that, in the event of violation, the War Food Administrator was empowered to suspend, revoke or reduce the quota allotted to the violator; to prohibit such person from receiving or using milk or any other material subject to control by the War Food Administrator; and to recommend that such person be prevented from receiving any materials subject to priority or allocation by other government agencies. It also stated that a wilful violation of the order constituted a crime punishable

under applicable laws.[1] On October 4, 1943, this order was extended to the Cleveland, Ohio, area by Food Distribution Order No. 79–3 (8 F. R. 13367), which fixed quotas for handlers for sales of milk in the civilian market and provided for an assessment upon the handlers of one cent per hundredweight on quota milk.

On January 10, 1944, petitioners, 27 persons engaged in the business of distributing milk and milk byproducts in the Cleveland area, filed a complaint and a motion for preliminary injunction in the United States District Court for the Northern District of Ohio against respondents Issler and Varney, market agent and deputy agent, respectively, for the Cleveland area, and Marvin Jones, War Food Administrator, seeking to enjoin them from enforcing Food Distribution Orders Nos. 79 and 79–3 on the ground that the assessment provisions of the orders were unauthorized (R. 2–6). The defendants appeared specially and moved to quash service and to dismiss the complaint and the motion for preliminary injunction (R. 13). The court quashed service as to the War Food Administrator, but otherwise overruled the motion (R. 15–16). Respondents then filed an answer in which they alleged *inter alia* that the complaint failed to show such threatened injury to petitioners as would confer equitable jurisdiction upon the court (R. 16–19). A hearing was had on the motion for preliminary injunction which was, by agreement, considered as on final hearing (R. 22).

[1] The full text of Food Distributon Order No. 79 appears at pp. 7–9 of the record.

On May 27, 1944, the court entered findings of fact and conclusions of law (R. 105–111). It found that on October 6, 1943, respondent Issler called a meeting of milk dealers in Cleveland and explained the purpose and operation of Food Distribution Order No. 79; that he read the order to them, including the provisions in respect of sanctions for violations; that in response to a question from the floor, he advised the dealers that rationed products could be withheld from violators of the order and used the word "jail";[2] that a report of Issler's statements respecting sanctions was published in the Cleveland Plain Dealer. The court also found that respondents had sent letters to petitioners requesting that reports be filed and on one occasion requesting that the assessment be remitted, but that neither of the respondents nor anyone acting on their behalf had at any time addressed threats to petitioners personally. (R. 105–106.) It was further found that the Market Agent's enforcement powers "are limited to investigating and reporting to the Director of Food Distribution of violations of the Orders" (R. 105). The court concluded that respondent Issler's reading of the order and his reference to sanctions was "a sufficient showing of irreparable damage done or threatened to the plaintiffs by the defendants to afford the plaintiffs a basis for seeking injunctive relief" (R. 109), and held that the assessment provisions of Food Distri-

[2] Issler testified that he remarked that he "didn't think anybody would go to jail;" that he thought other sanctions would be used in enforcing the order (R. 30).

bution Order No. 79 were "outside of the powers delegated to the President under the Second War Powers Act" (R. 110). It accordingly entered an order permanently enjoining respondents, their agents, or anyone acting on their behalf, from enforcing the assessment provisions (R. 112).

On appeal, the Circuit Court of Appeals for the Sixth Circuit held that the cause was cognizable in equity but that the assessment provision was an authorized regulation (R. 118–130). It therefore reversed the order of the district court and remanded the cause with directions to dismiss the complaint (R. 117).

ARGUMENT

Although the court below held to the contrary, we submit that the facts found by the district court in themselves plainly demonstrate the absence of the requisites for the exercise of equity jurisdiction. This Court would accordingly not be called upon to decide the question presented by the petition for certiorari relating to the validity of the regulation requiring milk handlers to pay assessments.

Furthermore, on June 21, 1944, after the entry of judgment in the district court, the assessment provisions of the regulations were deleted by the Administrator (9 Fed. Reg. 6982) immediately prior to the passage of the 1945 Department of Agriculture Appropriation Act with a provision prohibiting the expenditure of funds in the execution of orders (save as to walnuts) which provided for assess-

ments.[3] Although this does not make the case moot insofar as it concerns assessments due before June 1944, it does greatly lessen its importance, inasmuch as since that time no order (except as specifically permitted for walnuts) has contained an assessment provision. The question as to the validity of the assessments has been raised in no other case.

1. Notwithstanding the holding of the courts below, we think that petitioners failed to establish facts conferring equity jurisdiction on the district court. The only "threat" which the district court found respondents to have made was the public announcement on October 6, 1943, of the sanction provisions of Food Distribution Order No. 79. In the three months that intervened between that time and the filing of the complaint, no threat was made to petitioners, even though they had failed to file reports required under other provisions of the order, the validity of which is not challenged.[4] Moreover, respondents were without power to impose any sanc-

[3] The Act was approved by the President June 28, 1944. Pub. Law 367, 78th Cong., 2d sess., c. 296, p. 25. The paragraph appropriating for the War Food Administration contains a proviso "that none of the funds herein appropriated shall be used for the promulgation or execution of orders under which assessments are made against producers or handlers of agricultural products, excepting walnuts, for administration of such orders." An identical proviso was contained in the Appropriation Act for the fiscal year ending June 30, 1946. Pub. Law 52, 79th Cong., 1st sess., c. 109, p. 20.

[4] At the district court's direction after a pretrial conference, such reports were filed on the first day of the hearing (R. 49, 106).

tions themselves; they could merely report violations to the Director of Food Distribution (R. 29, 30, 35, 105. See Appendix, *infra*, p. 14).

The War Food Administrator and the Director of Food Distribution, over whom the district court concededly had no jurisdiction, had power under the order only to suspend, reduce or revoke quotas or to prohibit the receipt or use of rationed products subject to their control. Before exercising such power, however, they were required to give notice and hold a hearing (Procedural Regulation No. 1, 8 F. R. 16497), and any order suspending an allocation would be subject to judicial review. Pub. Law 509, 78th Cong., 2d Sess., c. 614. There was no proof and no finding that any such proceeding had been instituted or threatened. Also, the War Food Administrator could merely recommend that violators of the order be prohibited from receiving materials subject to priority and allocation by other government agencies (Food Distribution Order No. 79, paragraph (h), *infra*).[5] In any event, it is not the policy of the Administrator to seek to collect assessments through the suspension of quotas or allocations, and no proceedings for this purpose have ever been instituted against anyone.

Even the War Food Administrator is without power to impose the penal sanctions on which the district court based its conclusion that petitioners had been threatened with irreparable damage. The criminal penalties of the Second War Powers Act can be enforced only by the Attorney General or the

[5] This provision was deleted on August 16, 1944 (9 F. R. 10035).

United States Attorney (R. 78–80); it does not appear that they have made any threats, and they are not parties to this suit. Civil actions to collect the unpaid assessments would also have to be brought by these officials of the Department of Justice. The possibility of such civil judicial proceedings in which the validity of the assessments could be contested would not show that the remedy at law was inadequate but the contrary.

Under these circumstances, on the district court's own findings of fact, there was no such showing of clear and immediate injury or threat of irreparable damage as would justify the invocation of the equity powers of the district court. *California* v. *Latimer*, 305 U. S. 255, 261; *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, 173–174; *Yarnell* v. *Hillsborough Power Co.*, 70 F. 2d 435 (C. C. A. 5). The decision of this Court in *Columbia System* v. *United States*, 316 U. S. 407, 417–418, which the circuit court of appeals considered as upholding the equity jurisdiction of the district court (R. 125), is readily distinguishable, for there the complaint alleged that the mere pronouncement of the challenged regulation had an immediate adverse effect on the plaintiffs' contractual relations with third parties. Here the challenged regulation merely fixed a small assessment and could have no effect on plaintiffs' business until some steps were taken for its collection.[6] Until petitioners could show that the assessment was to be enforced by a method which would deprive them of an effective remedy for determining

[6] One of the petitioners testified that the assessment against him amounted to about $50 per month (R. 65).

its validity, they could not establish threatened irreparable injury.

2. On the merits, we think that the decision of the circuit court of appeals is correct in holding that the assessment provision represents an appropriate exercise of the power conferred on the President to allocate scarce materials "upon such conditions * * * as he shall deem necessary and appropriate in the public interest and to promote the national defense." It has been held in some circumstances that a congressional grant of power to an administrator to make rules and regulations to effectuate a statute includes the power to fix fees as an incident to such regulation. *Hamilton* v. *Dillin*, 21 Wall. 73, 93; *United States* v. *Grimaud*, 220 U. S. 506, 522. We submit that special considerations affecting the milk industry demonstrate that the assessment here involved is an appropriate means of exercising the power to allocate. Due to many factors, including the perishable nature of milk, its importance as a food, the variations in the size and character of organizations for its distribution, and the prevalence of local regulations governing its production and sale, a high degree of decentralization in a regulatory program is imperative. Specialized local supervision is therefore a characteristic of regulation in the milk industry and statutes providing for such regulation have customarily included provisions whereby the cost of such local supervision is borne by the industry itself. Thus, Section 10 (b) (2) of the Agricultural Adjustment Act, as reenacted by the Agricultural Marketing Agreement Act of June 3, 1937 (50 Stat.

246) (7 U. S. C. 610 (b) (2)), provides that a handler subject to a marketing order under that Act shall pay a pro rata share of the expenses found to be necessarily incurred in the maintenance of the agencies established by the Act. A number of state laws regulating the sale of milk also provide for payment of fees by the industry to administrative agencies for administrative expenses.[7] The same type of local supervision is necessary for the effective administration of Food Distribution Order No. 79. Under that order 144 supplemental orders establishing milk sales areas have been promulgated and such orders are in effect in 40 states and the District of Columbia.[8] In the light of these circumstances it was appropriate for the War Food Administrator, in exercising the authority delegated in the Second War Powers Act to allocate scarce materials, to utilize the method which was customary in the milk industry and which had been found by both federal and state legislators to be peculiarly adapted to the regulation of milk.

As has been pointed out, in the 1945 Department of Agriculture Appropriation Act (Pub. Law

[7] California Agricultural Code (Deering), Sec. 736.3; Connecticut Gen. Stat. (1941 Supp.), Sec. 338f; Florida Stat. Ann. (1941), Sec. 501.09; Maine Laws of 1935, c. 13, Sec. 7; Massachusetts Acts of 1941, c. 691, Sec. 9 (a); New York Agriculture and Markets Law (McKinney, 1944 Supp.), Sec. 258–m; Rhode Island General Laws, 1938, c. 215, Sec. 6; Virginia Code (1942), Sec. 1211gg.

[8] These figures were supplied by the office of the War Food Administrator. The supplemental orders, all of which are similar to Food Distribution Order No 79–3 (see p. 4, *supra*), are published in the Federal Register.

367, 78th Cong., 2d sess., c. 296), Congress inserted a proviso that none of the funds appropriated to the War Food Administrator "shall be used for the promulgation or execution of orders under which assessments are made against producers or handlers of agricultural products, excepting walnuts, for administration of such orders." By allowing the assessment to be continued against shippers of walnuts,[9] Congress indicated that it did not consider that the various assessment provisions then in effect were beyond the powers delegated in the Second War Powers Act. The proviso represented merely a congressional determination to meet the expenses of local administration in a different fashion, and Congress accordingly appropriated an additional $1,100,000 for such purpose (see S. Rep. No. 886, 78th Cong., 2d sess., p. 7; H. Rep. No. 1605, 78th Cong., 2d sess., p. 6).

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

HUGH B. COX,
Acting Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

JUNE 1945.

[9] The order allocating walnuts produced on the West Coast and providing for an assessment against shippers had been issued on September 28, 1943, prior to the passage of this Act (8 F. R. 13283).